

Mahrami (Migration) [2019] AATA 4654 (11 October 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mr Mohammad Zia Mahrami

VISA APPLICANT: Mrs Kubra Mahrami

CASE NUMBER: 1730784

DIBP REFERENCE(S): BCC2015/1486612

MEMBER: Adrienne Millbank

DATE: 11 October 2019

PLACE OF DECISION: Brisbane

DECISION: The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211 of Schedule 2 to the Regulations
- cl.309.221 of Schedule 2 to the Regulations

Statement made on 11 October 2019 at 12:54pm

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa – Subclass 309 (Partner) (Provisional) – genuine spouse or de facto relationship – valid marriage – religious wedding not properly registered in home country – remarriage in other country – financial, household and social aspects of relationship – nature of commitment – relationship genuine and continuing – decision under review remitted

1.

2. **LEGISLATION**

3. *Migration Act 1958 (Cth), ss 5F(2), 65*
Migration Regulations 1994 (Cth), r 1.15A(3), Schedule 2, cl 309.211(2)(a), 309.221

CASE

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Immigration on 4 October 2017 to refuse to grant the visa applicant a Partner (Provisional) (Class UF) visa under s.65 of the *Migration Act 1958* (the Act).
5. The visa applicant (the applicant) was born in Afghanistan in 1990 and is 28 years old at the time of decision. The review applicant and sponsor (the sponsor) was born in Afghanistan in 1983 and is 35 years old at the time of decision. The sponsor has lived in Australia since 2001. He was granted a Temporary Protection (Subclass 785) visa in November 2001 and a Permanent Protection (Subclass 866) visa in 2005. He obtained Australian citizenship by grant in 2007. The parties claim they married in Afghanistan in October 2014, and that since this time the applicant has lived in India with the sponsor's mother, sister and sister's family.
6. The applicant applied for the visa on 24 May 2015 on the basis of her relationship with her sponsor. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
7. The Delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2)(a), and therefore did not satisfy cl.309.221.
8. The Delegate was not satisfied that the parties had provided evidence that their marriage in Afghanistan was properly registered and thus met the requirement of a valid marriage under s.5F of the Act. The parties had submitted a witnesses statement (*wasika*) attesting to a *Nikkah Khat* (Islamic religious ceremony). The parties had further submitted a letter from the Embassy of Afghanistan in New Delhi, India, dated 2 February 2017, stating that a marriage certificate had been 'prepared' at the Embassy in New Delhi.
9. The Delegate considered whether the applicant met the requirements for a de facto partner. The Delegate noted that the applicant had not claimed, and there was no evidence before the Delegate, to suggest that the applicant was in a de facto relationship with the sponsor for 12 months prior to the lodgement of the application. The Delegate found the applicant did not meet the de facto requirements.
10. The sponsor and applicant were represented in relation to the review by their registered migration agent.
11. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The issues in the present case are whether the parties are validly married, and if so whether they were in a genuine spousal marriage at the time of application and decision.

Whether the parties are in a spouse or de facto relationship

13. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an

Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian citizen.

14. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

15. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship.
16. In a written submission received by the Tribunal on 23 July 2018, the parties' representative advised that the applicant 'fled' Afghanistan to India with members of the sponsor's family, where they have since been living as refugees waiting for resettlement. The representative advised that they were not able to obtain the 'booklet marriage certificate' because they did not want to return to Afghanistan and apply in person, as required. Following the visa refusal, the sponsor returned to India and the parties were advised that they could be issued a booklet marriage certificate if they married again, in India. The couple married again in India.
17. A marriage certificate issued by the Embassy of the Islamic Republic of Afghanistan in New Delhi was provided certifying that the parties married in New Delhi on 30 January 2018. On 20 August 2019 the Tribunal referred the certificate to the Department of Home Affairs for verification. The ICSE records indicate that the integrity check on the marriage certificate was completed on 11 September 2019, with the certificate verified as genuine.
18. On the evidence, the parties are married to each other under a marriage that is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

Financial aspects of the relationship

19. The parties live in different countries, and as yet have no joint ownership of assets or joint liabilities. In her application form the applicant stated that the sponsor has supported her financially since their marriage. Evidence was provided in the form of receipts from Western Union that between 31 October 2016 and 16 February 2019 the sponsor sent funds six times to the applicant in India, ranging in amounts from AUD 499.20 to AUD 980.46.
20. The sponsor works as a tiler in Australia. Statutory declarations provided at the time of application by a friend and a colleague of the sponsor stated that they knew the sponsor to be married, and that they had observed that the sponsor has worked hard to support his wife in India. They further declared that they had observed the sponsor to be a mature, respectful person who loves his wife.

21. The Tribunal finds that the parties have pooled financial resources consistent with being in a spousal relationship while living in different countries.

Nature of the household

22. As noted, the applicant has lived in India since her marriage with the sponsor. A letter addressed 'To Whom it May Concern' by the UNHCR in India, dated 27 April 2017, was provided certifying that the applicant is a national of Afghanistan and a 'person of concern' to the UNHCR.
23. The applicant's movement records support his claim that he travelled to Afghanistan from 4 August 2014 to 5 December 2015, when the parties became engaged and held their wedding ceremony in Kabul. They support the applicant's claims that the sponsor travelled to India to live with her in India from: 9 July 2015 to 15 October 2015; 3 December 2015 to 3 January 2016; 1 December 2016 to 8 February 2017; 17 January 2018 to 2 March 2018; 12 August 2018 to 15 September 2018; and 18 April 2019 to 6 May 2019.
24. The parties do not have children. The Tribunal accepts that they have lived together while in the same country since their marriage in Kabul in October 2014, and that the sponsor has financially supported the applicant to live in India.

Social aspects of the relationship

25. As noted statutory declarations were provided at the time of application by friends and colleagues of the sponsor who declared they knew the sponsor to be married to the applicant and committed to supporting her, as his wife. Photos were provided of the parties' engagement and wedding ceremonies and receptions in Afghanistan, attended by family and friends.
26. The Tribunal accepts that the parties have represented themselves to other people as being married to each other; that in the opinion of friends and acquaintances they are a married couple; and that the parties planned and undertook joint social activities as a couple around the time of their engagement and weddings in Kabul and New Delhi.

Nature of persons' commitment to each other

27. In their written relationship statements provided at the time of application the parties describe how they have communicated by phone and Facebook since their first contact with each other in November 2013. They describe how the sponsor travelled to Kabul in July 2014, met the applicant's family, obtained approval for the marriage, and proposed. The parties held an engagement party in August 2014 and a wedding on 13 October 2014, in Kabul.
28. As noted, the sponsor moved the applicant to India after the marriage with other members of his family, including his mother and sister. In statutory declarations provided at the time of application, friends and colleagues of the sponsor declared him to be a mature and responsible person who loves his wife and has worked hard to provide for her financially. The applicant declared in the application that she and the sponsor have communicated by phone or Facebook nearly daily, while in different countries.
29. The Tribunal notes that in a telephone interview with the Department on 31 January 2017 the applicant stated that the sponsor moved her and other family members to India after their marriage in October 2014 for 'better security'; that her sister and the sponsor's sister are close friends and put them in contact with each other; and that the sponsor has travelled to India as much as he has been able, in order to be with her. The Tribunal notes that in the

Delegate's assessment notes following the interview, the Delegate describes the applicant as prompt and confident in her responses; the Delegate places weight on the sponsor having resided with the applicant in India; the Delegate is 'satisfied with their relationship' based on the applicant's verbal testimony; and the Delegate is waiting for wedding photos and the parties' marriage certificate.

30. The parties' marriage certificate and wedding photos are before the Tribunal, and the Tribunal has found the parties have validly married.
31. The Tribunal is satisfied on the information and evidence before it that the parties have been in a relationship of five years duration; that they have lived together for extended periods when the sponsor has been able to travel to India; that they have provided and continue to provide companionship and emotional support to each other, and that they see the relationship as long-term.
32. The Tribunal therefore finds against s.5F(2)(b)-(d) that the parties do have a mutual commitment to shared life to the exclusion of others; that they are in a genuine and continuing relationship; and that they intend to live together and not separately and apart on a permanent basis.
33. On the basis of the above the Tribunal is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.
34. The Tribunal has found that the visa applicant meets cl.309.211(2)(a). Therefore the applicant meets cl.309.211 and cl.309.221.
35. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

36. The Tribunal remits the application for a Partner (Provisional) (Class UF) visa for reconsideration, with the direction that the visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
 - cl.309.211 of Schedule 2 to the Regulations
 - cl.309.221 of Schedule 2 to the Regulations

Adrienne Millbank
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).